BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

KRISTI M. EMBRY	)	
Claimant	)	
V.	)	Docket No. 1,074,475
	)	
WESTAR ENERGY, INC.	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent appealed the November 5, 2015, Preliminary Hearing Order entered by Administrative Law Judge (ALJ) Steven Roth. Kala Spigarelli of Pittsburg, Kansas, appeared for claimant. John D. Jurcyk of Kansas City, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 2, 2015, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

The Preliminary Hearing Order notes that K.S.A. 2014 Supp. 44-508(f)(1) defines an injury as a change in the physical structure of the body. The ALJ indicated claimant had such a change in physical structure as a result of her April 13, 2015, accident. The ALJ ordered respondent to pay temporary total disability benefits (TTD) and to provide medical treatment.

Respondent filed an application for review on November 17, 2015, questioning whether claimant's accident was the prevailing factor causing her medical condition and disability. Respondent also contested whether claimant was entitled to TTD and medical care. Respondent filed no brief, but sent an email to the Board on December 7, 2015, indicating it was relying on the arguments it made at the preliminary hearing.

Claimant asks respondent's appeal be dismissed for failure to file a brief with the Board. Claimant asserts respondent cannot appeal an order solely on the issue of TTD. If the Board considers respondent's appeal, claimant requests the Board affirm the Preliminary Hearing Order.

The issues are:

1. Should respondent's appeal be dismissed because it did not file a brief with the Board?

2. Does the Board have jurisdiction to consider respondent's appeal?

3. Was claimant's April 13, 2015, accident the prevailing factor causing her injuries and need for medical treatment?

FINDINGS OF FACT

Claimant is a meter reader for respondent and drives and walks on her route. Claimant described her April 13, 2015, accident as follows:

> I had read the meter at a house and the note said to go [to the] west side of the garage down the alley to get to the next one. As I was doing that, it had been raining and it was muddy where I was going to step and I was getting ready to step on what I thought was concrete to put the bad leg on the solid and it was not, looked like cat litter and I slipped and fell down on my right hip.[1]

Claimant testified she also fell on her right arm. She immediately felt a pulling pain in her right front groin. Claimant was able to get up and walk, but experienced pain with every step. She continued her job duties and reported the accident when she returned to the office. Claimant did not request authorization to see a physician because she already was seeing Dr. Dennis A. Estep, who had been treating her for hip and groin injuries she sustained in a September 2, 2014, work accident.

Claimant indicated that after her September 2014 work accident, her pain was ten on a scale of one to ten with ten being the worst pain. She was not taken off work after the aforementioned work accident and performed her regular job duties as tolerated. For her September 2014 accidental injuries, claimant saw a chiropractor, several physicians, including Dr. Estep, and a nurse practitioner. After returning to work, claimant's pain was four to six on the pain scale and she was never without pain. Her pain was eight on the pain scale after her 2015 work accident. Claimant testified, "The first fall September 2nd is what caused the problem."[2] She believed she also suffered an injury as a result of her April 2015 accident.

Dr. Estep first saw claimant on February 4, 2015. He noted claimant was exquisitely tender along insertion of the right hip flexor and exhibited notable right hip weakness. X-rays were taken of the pelvis and lumbar spine. Dr. Estep's diagnoses were probable

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[1] P.H. Trans. at 9-10.

[2] *Id.* at 31.

right hip labral tear, possible ileal psoas tear and L3-4 lumbar instability. He recommended a right hip MRI arthrogram, a lumbar spine MRI and prescribed Vicoprofen.

The February 25 right hip MRI ordered by Dr. Estep was conducted by Dr. Mark Farnham. Dr. Farnham's impressions were labral signal alterations suspicious for a labral tear and substantial trochanteric bursitis accompanied by gluteus medius tendon strain.

Dr. Estep referred claimant to Dr. Derek W. Miller, who saw claimant on March 13, 2015. Dr. Miller reviewed MRIs of the lumbar spine, right hip and groin. He noted the MRIs did not show a significant labral tear and claimant had an age-appropriate labrum. The lumbar spine MRI revealed an L3-4 HNP with foraminal stenosis. His impressions were lumbar radiculopathy at L3-4 and no hip pathology.

Dr. Estep saw claimant again on May 11 and the notes from that visit do not mention claimant's April 2015 accident and indicated Dr. Estep was seeing claimant for a reexamination of a right hip labral tear and right hip flexor weakness. His impressions were a right hip labral tear and right hip flexor weakness.

Claimant was evaluated by Dr. John Carlisle on June 16, 2015, for her right hip. In a letter dated July 1, Dr. Carlisle opined, within a reasonable degree of medical certainty, that claimant's complaints stem primarily from left[3] hip femoroacetabular impingement (FAI), early joint chondrosis and an underlying labral tear. He indicated the FAI was a preexisting condition and unrelated to claimant's work injury, although her work injury likely exacerbated her underlying condition.

Claimant testified that on June 9, she was hurting badly and was given an office job. On July 2, respondent called and told her that she could no longer be accommodated in the office position. She has not worked since. Claimant believes she cannot work because she cannot rotate her right hip and has continuous pain. She uses a TENS unit and is on crutches.

At the request of her attorney, claimant was evaluated by Dr. Edward J. Prostic on July 27, 2015. Claimant informed Dr. Prostic of her September 2, 2014, and April 13, 2015, accidents. Dr. Prostic conducted a physical examination and ordered x-rays of the pelvis and right hip, which showed mild joint space narrowing of the right hip. Dr. Prostic stated:

> On or about September 2, 2014 and April 13, 2015, Kristi M. Embry sustained injuries to her right hip during the course of her employment. She had [a] torn labrum and appears to be having progressive osteoarthritis of the hip on a post-

[3] The July 1 letter refers to the left hip here, but states the June 16 evaluation was of the right hip. P.H. Trans., Resp. Ex. A. Claimant testified it is not her left hip that is bothering her. P.H. Trans. at 24.

> traumatic basis. . . . The injuries sustained on or about September 2, 2014 and April 13, 2015 while employed by Westar Energy are the prevailing factor in causing injury, the medical condition, and the need for medical treatment.[4]

PRINCIPLES OF LAW AND ANALYSIS

Respondent's appeal is not dismissed for failure to file a brief.

Claimant requests respondent's appeal be dismissed because it failed to file a brief with the Board. The Board denies claimant's request for reasons set forth in *Salvador*,[5] wherein Tyson asked the Board to dismiss Mr. Salvador's appeal because he did not file a brief. The Board denied Tyson's request to dismiss the appeal, stating:

> Claimant failed to send a submission letter to the ALJ and to file a brief with the Board. K.A.R. 51-3-5 requires each party to send a submission letter to the ALJ before the ALJ issues a decision. However, there is no penalty if a submission letter is not sent. K.A.R. 51-3-5, in part, states:
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> > If there is a dispute between the employer and the worker as to the compensation due and hearings are held before the administrative law judge for a determination of the issues, upon completion of submission of its evidence, each party shall write to the administrative law judge a letter submitting the case for decision. The administrative law judge shall not stay a decision due to the absence of a submission letter filed in a timely manner. The submission letter shall contain a list of the evidence to be considered by the administrative law judge in arriving at a decision. . . .
>
> There is no statute requiring a party, on an appeal to the Board, to file a brief. . . .
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> . . .
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> K.A.R. 51-18-4(a) contains no provision allowing the Board to impose a penalty upon a party for failure to file a brief. Nor can the Board find a prior appellate court or Board decision wherein an appeal to the Board was dismissed for failure of a party to file a brief.

As indicated above, there is no statute or Kansas administrative regulation/Director's rule requiring a party, on an appeal to the Board, to file a brief. Claimant's request to dismiss respondent's appeal is denied.

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[4] P.H. Trans., Cl. Ex. 1 at 3.

[5] *Salvador v. Tyson Fresh Meats, Inc.*, No. 1,043,100, 2015 WL 996890 (Kan. WCAB Feb. 11, 2015).

The Board has jurisdiction to determine if claimant's April 13, 2015, accident was the prevailing factor causing her injuries and need for medical treatment.

The ALJ ordered respondent to pay claimant TTD and provide medical treatment because she sustained a personal injury by accident on April 13, 2015, arising out of and in the course of her employment. K.S.A. 2014 Supp. 44-534a gives the Board jurisdiction to review issues of whether an employee suffered an accident, repetitive trauma or resulting injury and whether the injury arose out of and in the course of employment. Respondent asserts claimant's accident was not the prevailing factor causing her injuries and need for medical treatment.

K.S.A. 2014 Supp. 44-508(f)(2)(B) provides an injury by accident shall only be deemed to arise out of employment if the accident was the prevailing factor causing the injury, medical condition and resulting disability or impairment. Simply put, prevailing factor is an issue over which the Board has jurisdiction.

Claimant failed to prove her April 13, 2015, accident was the prevailing factor causing her injuries and need for medical treatment.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[6] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[7]

Claimant had two work accidents nearly seven and one-half months apart, one in September 2014 and the accident that gave rise to this claim. In both accidents, she injured her right hip and groin. For the following reasons, this Board Member finds claimant failed to prove her April 2015 accident was the prevailing factor causing her injuries and need for medical treatment:

- Claimant testified the September 2014 accident "is what caused the problem."

- Claimant testified that following her September 2014 accident her pain was four to six on a scale of one to ten, with ten being the worst pain. She indicated her pain was continuous after that accident.

[6] K.S.A. 2014 Supp. 44-501b(c).

[7] K.S.A. 2014 Supp. 44-508(h).

- Dr. Estep diagnosed claimant with a torn right hip labrum after her September 2014 accident. That diagnosis did not change after her April 2015 accident, nor did Dr. Estep indicate the labrum tear worsened.

- Dr. Carlisle indicated claimant's complaints stemmed from a preexisting hip condition, unrelated to her work accident and that her accident likely exacerbated that preexisting condition.

- Dr. Miller indicated claimant's MRIs did not show a significant labral tear and claimant had an age-appropriate labrum.

- Dr. Prostic opined claimant's September 2, 2014, **and** April 13, 2015, accidents were the prevailing factor causing her injury, medical condition and need for medical treatment.

Had the issue been whether claimant's September 2, 2014, and April 13, 2015, accidents were the prevailing factor causing her injuries and need for medical treatment, this Board Member might have found in favor of claimant. At this juncture of the proceedings, claimant did not prove, more probably than not, that her April 13, 2015, accident was the prevailing factor causing her injuries and need for medical treatment.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[9]

WHEREFORE, the undersigned Board Member reverses the November 5, 2015, Preliminary Hearing Order entered by ALJ Roth.

IT IS SO ORDERED.

Dated this ____ day of January, 2016.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

[8] K.S.A. 2014 Supp. 44-534a.

[9] K.S.A. 2014 Supp. 44-555c(j).

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Steven Roth, Administrative Law Judge